In the Supreme Court of the United States

October Term, 1916.

No. 22

[illegible] J. McCormick,

Petitioner,

vs.

[illegible] Company, a corporation, and [illegible] Company, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

October Term, 1946

No. .....

IRA J. McCULLOUGH,

Petitioner,

vs.

KAMMERER CORPORATION, a corporation, and BAASH-ROSS TOOL COMPANY, a corporation,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered June 29, 1946 (R. Vol. II, pp. 66-67).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals and the dissenting opinion of Judge Denman (R. Vol. II, pp. 58-65)

are reported in 156 F.(2d) 343, 345. The oral opinion of the District Court will be found in the record at Vol. I, pp. 46-50.

For earlier opinions in this suit see 323 U.S. 327, 148 F.(2d) 525, 138 F.(2d) 482, 39 F.Supp. 213.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1946 (R. Vol. II, pp. 57, 66-67). A petition for rehearing was denied on Sept. 9, 1946 (R. Vol. II, p. 86). The jurisdiction of this Court is involved under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether after a Federal District Court, at the direction of the Circuit Court of Appeals, has reopened a patent suit to permit full consideration on the merits of an asserted defense of patent misuse, and has entered an order denying a motion to modify a previous decree and to dismiss the complaint, such order is appealable under Section 129 of the Judicial Code providing for appeals from any decree which is final except for an accounting?

2. Whether respondent licensor and licensee by executing and carrying out a series of covenants contained in the exclusive patent license, prohibiting both the licensor and licensee from making, using, or renting any existing or future tools competitive with the patented tool, prohibiting the sale of the patented tool by either licensor or licensee, and prescribing the price which licensee must charge "as rental" for the use of the patented tool, ille-

gally misused the patent grant so as to bar an account in this suit?

STATUTES INVOLVED

Section 129 of the Judicial Code, 43 Stat. 937, 44 Stat. 1261, 28 U.S.C. §§ 227, 227a, provides in part:

> "Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections two hundred and thirty-nine and two hundred and forty shall apply to such cases in the circuit courts of appeals as to other cases therein: *Provided,* That the appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof: *Provided, however,* That the district court may, in its discretion, require an additional bond as a condition of the appeal. * * *
>
> "When in any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals: *Provided,* That such appeal be taken within thirty days from the entry of such

decree or from the date of this act; and the proceedings upon the accounting in the court below shall not be stayed unless so ordered by that court during the pendency of such appeal."

Sections 1 and 2 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2, provide in pertinent part:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *."

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

STATEMENT

Though phrased in terms of a jurisdictional issue, the first question raised by the present petition is relatively simple: In the course of patent litigation, the defendant presented an issue of patent abuse because of illegal restrictive covenants in the license agreement (R. Vol. I, pp. 5-11; also reproduced, for convenience, as an appendix hereto). These restrictive covenants, in an earlier certiorari in this same case, had induced the grant of the writ, and had been characterized by the Department of Justice, in an *amicus* brief, to "constitute an abuse of the patent privilege, contravene the Sherman Antitrust Act, and render the patent here unenforceable and invalid." The trial court, in direct opposition to decisions of this

Court and of several circuit courts of appeal, held against the defendant, and refused to modify its previous decree and to dismiss the complaint. The defendant appealed to the Ninth Circuit Court of Appeals, which, by a divided court, determined that the order was not appealable despite the provisions of Section 129 of the Judicial Code. In effect, the defendant cannot have a decision on a basic issue controlling the merits of the controversy until after a prolonged accounting, which may last several years, has been completed. The action of the Circuit Court of Appeals, in supposedly determining a mere question of jurisdiction, was characterized by the dissenting judge as a "clear case of obscuring in the form the essence of what, under our order, the lower court undertook and did." 156 F.(2d) at 346.

A brief review of the previous course of this litigation serves to bring into focus the issues presented.

These patent infringement suits, consolidated for trial, were previously before this Court on the question of patent misuse by virtue of restrictive covenants in a license agreement between the respondents. After certiorari had been granted and a full hearing had been held, this Court dismissed the writ without decision on the merits, because the "only question for which we granted certiorari is one not properly raised, litigated or passed upon below," and the "grounds asserted for the allowance of certiorari are inadequately supported by the record." 323 U.S. 327.

The record of the case then before the Court revealed that Respondent Kammerer Corporation was the owner and licensor of Reilly and Stone Patent No. 1,625,391, covering a tool for cutting and removing stuck drill pipe from

oil well holes. Respondent Baash-Ross Tool Company was the exclusive licensee under the patent. Suits were jointly brought and consolidated for trial in the federal District Court for infringement by petitioner. Petitioner, in his answers, denied both infringement and the validity of the patents, and in addition set up the defense that "the plaintiffs cannot maintain this suit because they do not come into this court with clean hands and are therefore estopped from enforcing any right of action against the answering defendant." (R. Vol. III, pp. 51-52, 78).

The Kammerer Corporation, the owner of the patent by assignment, was simply organized to hold the patent and license it. (R. Vol. I, pp. 6, 21; Vol. III, p. 163). It neither manufactured, sold, used, or leased tools. This corporation granted an exclusive license to Baash-Ross, which is in the business of manufacturing, selling, and renting oil-well fishing and other tools. The License Agreement (see appendix) bound the licensor and licensee not to manufacture, use or rent any "devices which will come or be in competition with the device or devices covered * * *."[1] The agreement further provided that the licensee might manufacture and use, *but not sell*[2] the patented tool. The use was confined to "rental" on a prescribed job basis for a prescribed rental of $190 per use. In practice the "rental" of the tool was made to the oil well owner, but

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1. As pointed out both by the petitioner and by the Department of Justice, in briefs filed in the previous hearing in this Court, the provisions of the License Agreement which precluded the parties from making or using devices competitive with the patented article were clearly unlawful; and the provisions making the "rental" for the patented device embrace services not covered by the patent necessarily distinguish the case from *United States v. General Electric Co.*, 272 U.S. 476.

2. Italics throughout are supplied unless otherwise indicated.

the licensee provided its own experienced operators to direct its employment (R. Vol. III, pp. 288, 290, 291). The $190 was charged for the entire operation. As "royalty," the licensor was to receive fifty per cent of "the *gross* earnings accruing by the use of said devices by the Licensee." Further, the licensor also was bound by the agreement not to sell the patented tool to anyone.[3]

Although the issue of patent misuse was present, it was not pressed by petitioner and was not picked up by the lower courts *sua sponte*. After an interlocutory injunction had been entered and an accounting for profits and damages ordered, but postponed pending appeal, the Court of Appeals affirmed by a divided vote. 138 F.(2d) 482. This Court, after granting review because of the patent misuse issue, dismissed certiorari for the reasons already outlined.[3]

On remand, the Circuit Court of Appeals was petitioned to deny the accounting because of the patent misuse, or permit the petitioner to litigate the matter before the trial court. The Court of Appeals amended its former judgment of affirmance to permit the matter to be tried before the District Court. 148 F.(2d) 525.

In accordance with this order reopening the case, petitioner moved the District Court to modify the interlocutory judgment by eliminating the provision for an accounting and also asked for a final judgment dismissing the original complaints. The only issue presented was that of patent misuse, which this Court had determined had not been previously tried below. The trial court devoted a day to

3. The patent expired pending review, so that injunctive relief no longer was of consequence.

argument, afforded an opportunity to introduce further evidence if either party deemed that necessary, and ultimately rendered an oral opinion (R. Vol. I, pp. 46-50) and entered many new findings of fact and conclusions of law. (R. Vol. I, pp. 16-26). Petitioner's motion was denied. In denying the motion the trial court approved the restrictive features of the license irrespective of whether "we call it a joint venture or not," since the license involved a single licensor and a single licensee:

> "* * * If we say that a man cannot agree with an exclusive licensee that he shall not handle other articles that might compete with it, we really prevent the patent owner from the benefit of the monopoly which his discovery entitles him to, under the Constitution, and the law, and the law of the State." (R. Vol. I, p. 48)

> "* * * the covenants themselves are of a character which the owner of a patent has a right to enter into with one whom he makes an exclusive licensee, aiming at the exploitation of the invention." (R. Vol. I, p. 49)

This denial of the defense of patent misuse terminated the litigation, with the exception of the accounting which is proceeding and may continue to proceed for some years. Petitioner then appealed to the Circuit Court of Appeals. The majority of that Court held that it was without jurisdiction under §129 of the Judicial Code, since the order denying the motion to modify the order for an accounting and to dismiss the suits was not a "decree, final or otherwise." The majority held that §129, in permitting appeals in patent cases where "a decree is rendered which is final except for the ordering of an

accounting" still required that an accounting be held before the newly-litigated and now controlling issue of patent abuse could be reviewed. Reliance for this conclusion was placed on this Court's recent decision in *Catlin v. United States*, 324 U.S. 229, a suit involving land condemnation under the eminent domain power. 156 F.(2d) 343. Judge Denman, dissenting, pointed out the impropriety of resorting to cases foreign to the patent field to sustain lack of jurisdiction. He deemed the order below "a final decision on the dominant issue", and the opinion of the majority "a clear case of obscuring in the form the essence of what, *under our order*, the lower court *undertook and did.*" 156 F.(2d), at 346.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals for the Ninth Circuit has decided an important question of federal law, which has not, but should be settled by this Court. In deciding this jurisdictional question, the majority below not only has defeated the policy of this Court in facilitating resistance to patent abuse, but has misinterpeted and misapplied this Court's recent decision in *Catlin v. United States*, 324 U.S. 229.

In the patent field, this Court has long been concerned with the monopolistic consequences of patent misuse. It has done what it has been able to do, to withhold the fruits of such abuse from persons acting contrary to the public interest or in violation of the anti-trust laws. Cf., e.g., *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240; *Carbice Corporation of America v. American Patents Development Corporation*, 283 U.S. 27; *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488. The policy of

this Court in recent years, it is submitted, has been to encourage and implement resistance to unlawful extension of the privileges conferred by the patent law. The object has been to prevent unlawful and unwarranted interference with normal competitive forces.

Resistance to improper claims of monopoly in a competitive field by virtue of patent protection is hampered and often rendered impossible by the great expense involved in contesting the validity of the patent said to dominate the field, or to attack its use on public policy and Sherman Act grounds. It has been generally conceded that patent litigation is expensive and that compensation for even a successful defendant in an infringement suit is wholly inadequate. *Woodward*, "A Reconsideration of the Patent System as a Problem of Administrative Law", 55 *Harv. L. Rev.* 950, 969 *et seq.* (1942). The line of least resistance is to accept a license on whatever terms one may be tendered or retire from the field, rather than undertake such an onerous burden of vindicating public policy.

The policy of this Court in aiding what is essentially defense of the public interest at private expense can be implemented only by a futherance of the Congressional effort to eliminate needless expense in patent litigation. The majority opinion below has struck a blow against that policy.

Section 129 of the Judicial Code has sanctioned interlocutory appeals in a number of situations. The granting of an interlocutory injunction or the refusal to modify or dissolve such a decree affords the basis for an immediate appeal. Thus in a patent case the entry of an order for an interlocutory injunction against infringement and requiring an accounting is appealable. In fact such an appeal

was taken in the instant case and the accounting was stayed pending its outcome. Likewise an unsuccessful motion, which was actually considered by the court, to dissolve an injunction would result in an appealable order. In the instant case, however, the injunction became non-operative by virtue of expiration of the patent.

Prior to 1927, the expiration of the patent in suit and the resulting mootness of the injunction phase of the infringement proceeding, had resulted in an anomalous situation. Although the policy of the law was to permit immediate and interlocutory appeals in patent suits, the elimination of the injunction prevented appeal prior to completion of the accounting. This led to the 1927 amendment providing for appeals in patent infringement cases when "a decree is rendered which is final except for the ordering of an accounting."[4]

The bill which resulted in this amendment was introduced at the request of Judge Evans of the Seventh Circuit Court of Appeals, had the approval of the Commissioner of Patents, the entire patent bar, and all of the Federal Judges. S. Rep. No. 1319, 69th Cong., 2d Sess. In support of the bill Judge Evans wrote:

> "* * * Some years ago the owner of a very important patent brought suit in one of the district courts of Illinois, and the defendant interposed the defense of invalidity. The case was very well contested, and the court was in doubt as to the validity of the patent. The court finally upheld the patent and found infringement. The defendant had for a long

4. For the history of this and prior amendments to Section 129, see *Brick v. A. I. Namm & Sons, Inc.*, 21 F.(2d) 179 (E.D.N.Y. 1927); *Ward Baking Co. v. Weber Bros.*, 230 Fed. 142 (C.C.A.3d, 1916).

period of time been infringing the patent. It took the position that it had a right to do so and was so advised by counsel. The account was a very long one, and I am satisfied that it cost the litigants $50,000. Finally the report of the matter was confirmed by the district court and judgment was entered against the infringer for something like a million dollars.

"The case has now reached our court, and there are about 15,000 pages of testimony. The appellant insists that the patent is invalid, although its appeal is both from the award and from that part of the decree which sustains the patent and holds the appellant as an infringer.

"If the patent should be declared invalid, all of this expense on this account will have been for naught. Not only will it have been a useless expense to the litigants, but it has taken much of the court's time.

"Appeals may now be taken from the interlocutory injunctional decree upholding the patent when a patent is granted. If, however, the patent has expired when the decree is entered, though it was in force when the suit was begun, an appeal can not be taken until a full account has been had.

"It is to remedy this situation that your bill H. R. 11840 has been introduced. I sincerely trust that it will pass at this session of Congress." (H. Rep. No. 1890, 69th Cong., 2d Sess., 1-2).

The policy of Congress was thus to eliminate the pendency of the injunction in an infringement suit as a factor in immediate appealability. Congress recognized the desirability of interlocutory appeals. And both before and after the 1927 amendment the courts made it clear how broadly Section 129 sanctioned appeals from interlocutory orders, especially in patent cases.

This Court has entertained a patent case appealed under Section 129 to the Court of Apeals for a second time prior to an accounting. *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82. Compare *Marconi Wireless Telegraph Company of America v. United States*, 320 U.S. 1, 47. In the *Grier* case, the interlocutory decision on a request for injunction, affirmed on appeal, was reopened on a request for rehearing, and the resulting order was likewise appealed.

Both successful and unsuccessful motions to vacate or dissolve injunctions have been held appealable under Section 129. *Schifrin v. Cheadle Mfg. Co.*, 117 F.(2d) 92 (C.C.A.2d, 1941) (motion to vacate granted); *Rivers v. Miller*, 112 F.(2d) 439 (C.C.A.5th, 1940) (motion to dissolve denied); *Mississippi Valley Trust Co. v. Railway Steel Spring Co.*, 258 Fed. 346 (C.C.A.8th, 1919) (motion to vacate denied); *Bothwell v. Fitzgerald*, 219 Fed. 408 (C.C.A.9th, 1915) (motion to vacate granted); *American Grain Separator Co. v. Twin City Separator Co.*, 202 Fed. 202 (C.C.A.8th, 1912) (motion to dissolve denied).

A denial of a motion to strike an answer has been held appealable. *Swan Carburetor Co. v. Nash Motors Co.*, 98 F.(2d) 115 (C.C.A.4th, 1938). And both under the earlier text of the Section and the 1927 addition an order denying a motion to amend a complaint with respect to a patent claim—a claim which had been held unenforceable by an earlier order in the case—was held appealable. *Michigan Carton Co. v. Sutherland Paper Co.*, 29 F.(2d) 179 (C.C.A. 6th, 1928).

This broad policy in patent cases is negatived by the majority of the court below by applying this Court's opinion in *Catlin v. United States*, 324 U.S. 229. This is

an application of the *Catlin* case, it is submitted, contrary to the intent of this Court. The Court, through Mr. Justice Rutledge, was interpreting policy in a wholly unrelated field involving different statutory provisions. The condemnation of land under the eminent domain power will seldom result in an illegal condemnation, but will frequently result in hotly contested questions of just compensation. In such circumstances it is efficacious to postpone review until a final judgment on all matters has been entered. In keeping with this policy, under §128 of the Judicial Code, only "final decisions" in such cases are reviewable. Even in this field, the Court recognized that in the District of Columbia interlocutory decrees in condemnation suits are reviewable by virtue of the statute there prevailing permitting review of interlocutory orders. See 324 U.S., at 232, footnote 6.

In the patent field there is a practical necessity, as has been seen, to avoid the expense of unnecessary accountings. In this entirely different setting, the application of the *Catlin* case is unwarranted and this Court can clarify the law by granting certiorari and reviewing the instant case.

There would seem to be little question that the order in the instant case was final except for the accounting, within the meaning of Section 129. It is not important whether a refusal even to *entertain* a rehearing is non-appealable. In the instant case, because of the public interest involved, the proceeding in the trial court was reopened to entertain evidence and make findings with respect to the heretofore dormant issue of patent misuse. The reopening was not evidenced by vacating the previous decree. That was not necessary unless on the merits the

petitioner proved to be successful in establishing patent misuse in violation of public policy or the Sherman Act. After full hearing, the trial court decided that the license agreement on its face was valid, making many new findings of fact, and entered an order refusing to dismiss the complaint or modify the requirement for an accounting. Since infringement and validity had already been determined, and *for the first time* the issue of patent misuse had been heard and disposed of, the case had become final, except for the accounting.

It is submitted Section 129 at that stage authorized an appeal. If the trial court had vacated its previous decree while it heard the patent misuse question and had then reinstated it, there would seem to be no question of appealability. Different consequences should not flow from the full hearing accorded, without this technical step, under the Court of Appeals' decision to permit the vital question of patent misuse to be litigated *for the first time* below. Once that issue was entertained by the trial court, which devoted a day to its exploration, it was clear that the case was reopened, that no accounting would *ever* be had unless the issue presented were resolved in favor of the respondents. When that issue was resolved the order entered was a final one, except for the accounting. The application of the *Catlin* case to this situation, and the defeat of Congressional and public policy involved, would require that certiorari be granted.

2. Of the substantive issue of patent misuse—the second question presented—the reasons which led this Court to grant certiorari when this case was last before it would seem to compel similar treatment now that the record has been perfected. The issue of patent misuse by virtue of

the license agreement between respondents has now been raised in the trial court, and that court has said:

> "* * * analyzing the instrument on its face, the covenants themselves are of a character which the owner of a patent has a right to enter into with one whom he makes an exclusive licensee, aiming at the exploitation of the invention." (R. Vol. I, p. 49)

Since both respondents covenanted not to deal in competitive devices, and since the Circuit Court of Appeals for the Third Circuit, in *National Lockwasher Company v. George K. Garrett Company, Inc.*, 137 F.(2d) 255, held such an arrangement in restraint of trade, review by this Court would seem necessary.

In addition, the rigid restrictions of the license on what the licensee may do and what it may charge for renting the patented tool, together with the necessary operating crew, raise a serious question as to whether the license has not been so conditioned "as to control conduct by the licensee not embraced in the patent monopoly." *Ethyl Gasoline Corporation et al. v. United States*, 309 U.S. 436, 456.

Insofar as the trial court sanctioned price-fixing by a *non-manufacturing* licensor, the court was extending *United States v. General Electric Co.*, 272 U.S. 476, beyond its legitimate scope. Such an extension is in conflict with *United States v. Vehicular Parking*, 54 F.Supp. 828 (D.Del. 1944), where the Court ruled that the "General Electric case is predicated upon the patentee making and vending the patented device." The continued validity of the *General Electric* case, even when confined to the facts there presented, has not gone without challenge. *United States v. Line Material Co.*, Oct. Term, 1946, No. 464. Its extension

in the instant case would seem to call for review by this Court. This is particularly so in the setting of the restrictive instrument involved, forbidding sales by either party and providing for rentals under narrowly defined circumstances. All this the trial court sanctioned to prevent "the patent right" from becoming "an illusory right." (R. Vol. I, p. 48)

Although this Court could confine its grant of certiorari to the jurisdictional question determinative of the case in the Court of Appeals, it is respectfully urged that the review granted be not so limited. This Court, in *Liberty Oil Co. v. Condon National Bank*, 260 U.S. 235, 245, stated:

> "* * * we could consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. On such an issue alone, however, we would not have granted the writ, because except for the important question of practice, the case was not of sufficient public interest to justify it."

In the instant case, the substantive question alone amply justifies review, as witness the previous grant of certiorari by this Court on the substantive question. Only further delay would ensue from remanding the case to the Court of Appeals for determination of the public policy issue of patent abuse which must ultimately be determined by this Court. Even unresolved doubts as to the jurisdiction of the courts below have not prevented this Court from passing on the merits of cases before it. Cf. *Inland Empire District Council v. Millis*, 325 U.S. 697. It is therefore urged that this case be reviewed in its entirety so that all questions may be determined.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 9, 1946.

R. Whelton Whann
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Of Counsel

(APPENDIX FOLLOWS)

Appendix

PLAINTIFF'S EXHIBIT No. 7

LICENSE AGREEMENT

THIS AGREEMENT, made and entered into this 18th day of October, 1923, by and between Kammerer Corporation, a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Santa Fe Springs, County of Los Angeles, State of California, hereinafter referred to as the Licensor, and L. F. Baash Perforating Company, a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Brea, County of Orange, State of California, hereinafter referred to as the Licensee:

WITNESSETH:

THAT, WHEREAS, the Licensor is the sole owner of Letters Patent No. 1,277,660,* covering Tools for Cutting and Removing Pipe From Wells, and of that certain application for Letters Patent of the United States, Serial No. 652,511, covering Tools for Cutting and Removing Pipe From Wells, which said application was filed on the 19th day of July, 1923;† and

WHEREAS, the Licensor has and does hereby warrant that it is the sole owner of the aforesaid inventions and all rights thereto; and

*Probably misprint in record as correct number of Kammerer Patent is 1,277,600.

†This is the application for the Reilly and Stone Patent in suit.

WHEREAS, the Licensee is desirous of obtaining a license to and for the said inventions and any Letters Patent which may be granted on said application to the Licensor;

NOW, THEREFORE, for and in consideration of their respective covenants and agreements hereinafter contained, and of the full and faithful performance of each and every thereof, the parties hereto have and do hereby mutually agree as follows:

1. The Licensor hereby grants to the Licensee the exclusive right and license to manufacture and use, but not to sell, devices embodying the aforesaid inventions under any Letters Patent now granted or which may hereafter be granted or any applications now pending or any patents hereafter obtained on improvements on the device or devices above mentioned, throughout the United States of America and the territories thereof, said license to continue for the full term of any Letters Patent granted for said inventions or improvements thereon.

2. The Licensee covenants and agrees during the term of this license to pay the Licensor hereunder upon all devices embodying the aforesaid inventions, a royalty of fifty percent (50%) of the gross earnings accruing by the use of said devices by the Licensee.

3. The Licensee covenants and agrees during the term of this license to charge as a rental for the use of said device or devices the sum of One Hundred and Ninety Dollars ($190.00) per cut made by said device or devices.

4. The Licensee agrees to keep true and accurate books of account showing in detail the number of devices embodying the aforesaid invention manufactured by the

Licensee, together with the dates of the use thereof and the names of the parties to whom the same were rented or upon whose property the same were used, which books of account shall be open at all usual business hours for the inspection of the Licensor or its duly authorized agents. The Licensee further agrees to render to the Licensor on or before the fifteenth day of each and every calendar month during the term of this license, a true and correct statement in writing, setting forth the quantity of said devices manufactured by the Licensee during the preceding calendar month, together with a statement showing the dates of the use or rental thereof and the number of cuts made and the parties for whom the device or devices were used during the preceding calendar month.

5. The Licensee covenants and agrees to pay to the Licensor at its office at Santa Fe Springs, Los Angeles County, California, the royalties on the cuts reported in the statements hereinabove provided within thirty-six days after the statements are rendered.

6. It is hereby mutually covenanted and agreed by and between the parties hereto that any accounts of business done under this agreement by the Licensee, which are not paid within six (6) months from the time the statements of such business are rendered to the Licensor as hereinbefore provided, shall be considered bad accounts and any royalties which may have been paid on such business shall be deducted from the royalty account of the Licensor.

It is further agreed that at the time of making any such deduction the Licensor shall have the right to take over

the collection of such account or accounts by so notifying the Licensee and that for the purpose of collection the Licensor may use the Licensee's name and that for every such account collected by the Licensor, the Licensor may retain in addition to its royalty, all costs of collection.

It is further understood and agreed that whenever the Licensor has refunded the royalty on any non-collectible account and the Licensee thereafter makes collection of said account, that the Licensee shall repay the royalty theretofore refunded.

It is further understood and agreed that the Licensee will cooperate with the Licensor by furnishing the necessary evidence to prove the account on such claims as the Licensor undertakes to collect pursuant to this agreement.

7. The Licensee covenants and agrees that in the manufacture of devices under this license agreement it will stamp on all such devices so manufactured the word "Patented," together with the date of said patent or patents.

8. The Licensor agrees to diligently prosecute the aforesaid application for Letters Patent, Serial No. 652,511, and procure Letters Patent covering said invention, if possible, at the earliest date, and the Licensor agrees to indemnify and save harmless the Licensee against any and all liability, damage, loss or injury adjudged or sustained by reason of any claim or suit that said device constitutes an infringement upon any Letters Patent heretofore or hereafter granted; provided, however, that in case suit is brought against the Licensee, the Licensor

shall be given notice thereof and shall have opportunity to intervene and defend said claim or suit.

9. The Licensee hereby covenants and agrees that the Licensor shall have, and it is hereby given, a first lien on all devices manufactured under this agreement as and for security for the payment to the Licensor of all unpaid royalties which may accrue during the term of this agreement.

10. It is hereby mutually covenanted and agreed by and between the parties hereto that should the Licensee become bankrupt or be thrown into the hands of a receiver or receivers, then and in that event the Licensor shall have the option to purchase all of the devices manufactured by the Licensee under the terms of this agreement at the agreed price of three hundred ($300.00) Dollars, for each and every such device, and in payment for such devices the Licensor shall deduct from the purchase price the amount of its lien or liens for unpaid royalties and pay the remainder, if any there be, to the Licensee's trustee in bankruptcy or receiver or receivers.

11. The Licensee covenants and agrees during the term of this license agreement not to manufacture or use or rent any device which will be in competition with the device or devices covered by this license agreement.

12. The Licensor covenants and agrees that during the term of this agreement, not to manufacture, sell, rent, license, use, or in any way do business with the device or devices covered by this agreement or with devices which will come or be in competition with the device or devices covered by this agreement.

13. It is mutually covenanted and agreed that this license shall be assignable by the Licensee only upon the written consent of the Licensor, its successors or assigns.

14. It is further covenanted and agreed that the Licensee shall manufacture and use the required number of devices necessary to take care of the demand for said devices amongst the operators in the oil-fields of the United States of America. And in the event the Licensee shall fail or neglect to furnish the devices necessary to take care of the demand of the oil operators in any or all of the oil-fields of the United States of America, the Licensor may serve notice on the said Licensee to manufacture and furnish devices to the operators of any or of all of the oil-fields of the United States and if within one hundred twenty (120) days after such notice has been served upon the Licensee, the Licensee still fails or neglects to furnish devices in any or all of the oil-fields of the United States where there is demand therefor, then and in that event, the Licensor may manufacture and use, or license others to manufacture and use, the devices covered by this license agreement, in such oil-fields where the Licensee shall have failed to supply the demand for such devices, provided, however, that nothing in this paragraph contained shall give the Licensor or its licensee or licensees the permission to alter the prices fixed by this license agreement for the use of the devices covered hereby; and provided further that nothing herein contained shall require the licensee to enter more than one oil-field in each six month period of this agreement.

15. It is further covenanted and agreed that the Licensor shall have a right and option to cancel and terminate this agreement upon written notice to the Licensee

upon a breach of the terms of this agreement by the Licensee, which notice shall specify the breach and shall give the Licensee a right and option to remedy the breach within thirty (30) days after said notice. In the event that this license agreement shall be terminated in accordance with this paragraph when the said Licensee agrees to pay all royalties on cuts made prior to the date upon which this agreement becomes terminated and agrees to sell and deliver to the Licensor all the devices in existence at such time at the agreed price of three hundred ($300.00) Dollars per device.

In Witness Whereof, the Licensor has caused this agreement to be executed by its President and Secretary, duly authorized, and has caused its corporate seal to be affixed, and the Licensee has caused this agreement to be executed by its President and Secretary, duly authorized, and has caused its corporate seal to be affixed, all on the day and year first above written.

(Seal) Kammerer Corporation,
By Geo. Kammerer, *President.*

Attest:

Burdena V. Fitzgerald,
Assistant Secretary.

(Seal) L. F. Baash Perforating Company,
By L. F. Baash, *President.*

Attest:

J. B. Reilly,
Secretary.

[Endorsed]: Pltff. Exhibit No. 7. Filed 5/8/41.